IN THE

Supreme Court of the United States

ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILROAD COMPANY....*Appellant*,

v. No. 183

WM. F. McKNIGHT, *ET AL*.....*Appellees*.

REPLY BRIEF OF APPELLANT.

Appellees insist in their brief that inasmuch as the defendant Gallup brought his suit before the filing of the bill in this case no injunction could be issued against him to restrain that action, under the provisions of Sec. 720 of the Revised Statutes. It has been repeatedly held that that section does not apply to ancillary proceedings where the court had jurisdiction of the original proceeding. Gunter v. Atlantic Coast Line, 200 U. S. 273, 292, and cases cited.

They further contend that overcharges for freight and passenger fares are not damages within the purview of the bond; that damages claimed for overcharges are not properly assessable against it, because liability on the bond is limited to such as

arise from the suspension or invasion of vested legal rights by the injunction, and the overcharges are the result of the wrongful act of the appellant in collecting unreasonable rates during the time the injunction was in force, and not of the injunction; that only the railroad commissioners, who alone were parties to the proceeding, could recover on the bond. This is a fair statement of the grounds of their contention, and we submit that it is based on a total misconception of the proceedings in the main case, and the principles involved in this proceeding.

In Reagan v. Farm Loan & Trust Co., 154 U. S. 362, 390, and M. K. & T. Ry. v. M. R. & W. Comnr., 183 U. S. 53, 60, it was held, in a case like this, that the State had no interest in a suit prosecuted in its name, or by one of its agencies, except its governmental interest in the welfare of all its citizens in compelling obedience to the law, and in re Englehard, 231 U. S. 646, it was held, in connection with the claims of patrons of the Gas Company for refunds, that the city was the representative of all parties interested in the proceeding, and the gas consumers were parties by representation.

As to the other proposition—that refunds are not assessable under the bond, on the ground that the liability is limited to damages that arise from the suspension of a legal right, that the overcharges while the injunction was in force were

wrongful and unlawful, it would seem almost a waste of time to refute them, but we will ask leave in connection with these contentions to call attention briefly to the record, and the undisputed allegations of the supplemental bill. The order made by Circuit Court Judge Van DeVanter, granting the injunction, provided that the freight and passenger rates complained of "be and are hereby suspended and the enforcement of each and all thereof be and the same is hereby restrained and enjoined until further orders of the court." It ordered that no suits or action should be brought against complainant by the defendants, or any shipper or passenger, for or on account of the failure of the complainant to keep the inhibited rates in effect, or for damages by reason of such failure during the time the order should continue in force. It further provided that the complainant should execute a bond in the sum of $200,000, conditioned that it would keep a correct account showing the difference between the rates charged and the inhibited rates, the particular carriage in question, the stations between which the same occurred and the name of the person affected, and, if it should be eventually held that the order of injunction should not have been made, the complainant would in every instance make refunds to the parties entitled thereto within a time to be fixed by the court. (Order and bond executed pursuant thereto. Record 39-41).

The supplemental bill alleges that during the pendency of the proceeding an application was filed by the defendants to modify the injunction by requiring complainant to establish reasonable rates during the time the injunction was in force, and to furnish additional bond. That at the October term, 1908, an order was entered by the court requiring the complainant to file with the proceedings and put into effect a schedule of rates so arranged as to produce a net increase of 33⅓% of the revenue produced by the inhibited rates, pursuant to which order a schedule of rates agreed upon between the complainants and the defendants in the cause, and known as the "Court Rates," was put into effect, and continued in force until the order dismissing the bill was entered on the 18th day of July, 1913. That the order required complainant to file, and it did file an additional bond in the sum of $800,000, conditioned that complainant should issue to all passengers coupons, and to the shipper of freight, freight receipts or bills, identifying the service rendered and showing the difference in the rate charged and the inhibited rates, and should within a reasonable time, to be fixed by the court, refund the excess to the owners and holders of such coupons and receipts. (Record 52.) On July 5, 1909, an additional injunction bond was filed as required by said order. (Record 43).

It is not true, as contended, that the act of appellant in collecting higher rates than those prescribed by the railroad commissioners and the statute during the time those rates were suspended by the injunction was illegal, or that appellant was a wrongdoer. It was acting under the order and protection of the court, and after the order modifying the injunction was made, in 1909, the freight rates charged were those prescribed by the court under an order providing specifically, and with great care, for the protection of shippers and travelers on the road in case it should be decided that the order suspending and enjoining the rates should not have been made. Marked and unusual care for the protection of shippers and travelers on the railroad and for the enforcement of their rights to refunds, under direction of the court, was taken at every stage of the proceeding.

The position taken by the learned counsel is very remarkable in view of this record. They seem to have overlooked the broad powers of courts of equity in moulding their proceedings and orders so as to protect the interest of all parties and do complete justice by settling and disposing of all questions that might arise in, or grow out of, proceedings before them.

The district court in the opinion filed by it in this case said:

"It will thus be seen that when the temporary injunction was granted by the Court it reserved to itself the right to require the railroad and the sureties on its bond to 'refund in each instance to the party entitled thereto' the monies collected in excess of the enjoined rates as directed by the court. The orders of the court and the bonds given in pursuance thereof are just as much for the benefit of every shipper and passenger as those who were made parties defendants to the suit as representatives of all shippers and passengers."

"The rule is well settled that where a court rightfully takes jurisdiction over the parties and the subject-matter of a controversy it has the right not only to render judgment in the first instance, but also to secure to the prevailing party the fruits of such judgment, and the original jurisdiction is a continuing one for that purpose."

Lamb v. Ewing, 54 Fed. 273.

Farm Loan & Trust Co., 129 U. S. 213.

It is on this principle that courts of equity exercise the jurisdiction to take an account of the damages caused by injunctions issued and dissolved in proceedings before them. "The imposition of terms and conditions upon the parties before the court is an incident to its jurisdiction over the case; and having possession of the principal case, it is fitting that it should have power to dispose of the

incidents arising therein, and thus do complete justice, and put an end to further litigation."

Russell v. Farley, 105 U. S. 433, 445.

"The court that orders the injunction prescribes the terms upon which it shall be issued, and may require a bond, stipulation or undertaking as a condition upon which it shall be issued or not, according to its own view of the circumstances of the case. An assessment of damages thus becomes an incident of the principal case, and enables the court to do entire equity between the parties."

Lee v. Deakin, 13 Fed. 514, 515.

"The suit from its inception is in this court. The conduct of the parties is always under its supervision. The character of the questions involved, and the ease or difficulty in reaching a conclusion upon them, can nowhere be as well known as in the court which heard, considered and decided them. The court may also determine whether any further proceedings are necessary; and may content itself by fixing costs on the complainant, with an order that no further damages can be recovered against it."

Coosaw Mining Co. v. Farmers' Mining Co., 51 Fed. 107.

See cases cited at p. 14 *et seq.* of our original brief.

The only cases cited in appellees' brief in opposition to the jurisdiction of the district court to assess

damages are New York v. Brown, 179 N. Y. 303; Chicot Lumber Co. v. Dardell, 84 Ark. 145, and Dodson v. Butler, 101 Ark. 416.

In the first case Brown occupied a pier on East River under a revokable license from the city and an agreement to pay a stipulated rental. The commissioner of the docks revoked the license and notified Brown that the use of the pier for dumping was illegal. He commenced an action to restrain the city from interfering with the occupancy, which was dismissed on hearing. Afterwards the city sued him at law for the use and occupancy of the pier. The court held that the damages for the use and occupancy did not arise out of the granting of the injunction, and was recoverable in an action at law. The courts of New York have steadily adhered to the rule for which we are contending. In Chicot Lumber Company v. Dardell, the plaintiff had taken possession of and converted property of the defendants, who filed a cross bill in the case asking for damages for the property so converted, and the court held that the fact that there was an injunction which may or may not have aided the Lumber Company in making the conversion would not prevent the defendant from recovering the value of the property which, the court said, was a purely legal right arising in an equitable suit. Dodson v. Butler supports our contention. It was a proceeding for restitution under a judgment that

had been reversed on appeal. The court said at page 420:

> "The court, by its own act having occasioned wrong by the rendition of an erroneous judgment, has the inherent power by summary proceedings to afford redress to the injured party. The redress to which the aggrieved party is entitled is the restitution of the specific property which he has lost by the enforcement of the erroneous judgment, if that can be done. It is the duty and legal obligation of the party to the action securing such property to make restitution upon a reversal of such erroneous judgment; and the court, having jurisdiction of the subject-matter and of the parties, has ample authority to enforce the performance of that duty."

It is manifest that all rates charged by complainant for the transportation of freight and passengers in excess of the commissioners' freight rates and the statutory passenger rates were the result of the order suspending and enjoining the enforcement of those rates. It follows that the right of shippers and passengers to the refund of the excess is an incident to the decree of dismissal, and therefore the district court was authorized to direct an account to be taken of the damages sustained by the parties in interest with the view of requiring refunds to be made as contemplated in the original order granting, and the later order of the court modifying, the injunction. And having taken jurisdiction for that purpose its authority was exclusive.

The learned counsel quote language from the opinion in the case of State of Missouri *ex rel* Barker v. C. & A. R. R. Co., 216 Fed. 562, and say the quotation states their position exactly. Doubtless so. But the case has no bearing on the questions involved in this proceeding. It was a suit brought by the State of Missouri, on the relation of the attorney general, to recover excess charges while the injunction in the Missouri cases were in effect, and removed by the defendant to the Federal Court. But in that case the court which granted the injunction had not undertaken to assess the damages and it was, therefore, open under all the authorities for the shippers, or whomsoever was authorized to represent them, to proceed in other jurisdictions. Counsel comment on the reference to the case of Horton v. Myers, 108 U. S. 149, contained in our original brief, in a way that indicates that they do not understand the purpose for which the case was referred to. The question decided in that case is not involved in this, and the reference was only made for the purpose of illustrating the proposition that the District Court had jurisdiction of the ancillary proceeding on the ground that it involved a Federal question, namely, the construction of the effect of the final decree rendered in the main case. The proper interpretation of the provisions of the decree, however, do not arise in this proceeding, and

we have not intended to discuss it, or do more than call attention to the fact that a Federal question was involved.

Respectfully submitted,

J. M. MOORE,
Attorney for Appellant.

EDW. J. WHITE,
Of Counsel.

INDEX.

PAGE.

Statement of the Case..... 1
Opinion of Judge Amidon 4-39
Argument. 6
Election—Waives Coercion 7
Sec. 720, Revised Statutes 7
Former Adjudication, *Res Adjudicata* and *Stare Decisis*. 9-14
Doctrine of Relation 11
Contention of Appellees 12
Rules. 13-21
Person not a Party 13
Injunction Bond, Recovery On 15-22
Missouri Rate Cases 20
Assumpsit 23
Fund Impounded 24
A Multiplicity of Suits 36

CASES CITED.

Russell v. Farley, 105 United States 443 5-15
In re Englehard & Sons Company, 231 U. S. 646. 5-25

PAGE.

In re City of Louisville, 231 U. S. 639 5-25

United States v. Bitter Root Development Company, 200 U. S. 451 5-39

Hale v. Allison, 188 U. S. 56, 72 et seq. 5-39

Louisville v. Cumberland Telephone Co., 231 U. S. 652. 5

In re Moore, an Infant, 209 U. S. 490..... 6

Ex parte Wisner, 203 U. S. 449..... 6

Hayes v. The Fidelity Co., 112 Fed. 872..... 7

Rev. Stats. Sec. 720..... 7

Kansas City Southern Railway Company v. Quigley, 181 Fed. 190, and cases cited therein. 9

Mathew VI, 27..... 13

Coleman v. Newby, 7 Kansas 91, per Valentine. 13

Phillips v. Amalgamated Association, 208 Fed. 335. 14

Bein v. Heath, 12 Howard 168 15

Phelps v. Foster, 18 Illinois 309..... 17

Surgis v. Knapp, 33 Vt. 486 18-36

Edwards v. Pope, 3 Scam. 465..... 18

Roberts v. Bent, 4 O. S. 502 18

Missouri Rate Cases, Supreme Court Reporter, Vol. 33, pages 976 to 984..... 20

PAGE.
Federal Reporter, Vol. 210, p. 902 20
Bone et al., Trustee, v. United States, 93 U. S. 642. 23
Cory v. Curtis, 3 Howard 236..... 23
Swift, etc., Co. v. U. S., 111 U. S. 232..... 23
Lonergan v. Buford, 148 U. S. 241..... 23
Lanborn v. Board of County Commissioners, 97 U. S. 181..... 23
New York v. Brown, 179 N. Y. 303 (72 N. E. 114). 24-26-35
Chicot Lumber Co. v. Dardell, 84 Ark. 145.24-27-36
Dodson v. Butler, 101 Ark. 416..... 27
State of Missouri ex rel. Barker v. C. & A. R. R. 216 Fed. 562 27
Stewart v. State, 20 Md. 92..... 28
Morgan v. Megley, 53 Pa. St. 153..... 28
Brown v. Jones, 5 Nev. 374..... 28
Collins v. St. Claire, 51 Ill. 328..... 28
Burgen v. Sharer, 14 Monroe 497..... 28
Duncan v. Davis, 37 Ala. 95..... 29
Ashley v. Morrison, 1 Esp. 48..... 29
Vickers v. Wellocks, 8 East 1..... 29
Patterson v. Kingland, 8 Blatchford 278..... 29

PAGE

Lacy v. Taylor, 24 Md. 282..... 29

Meysenberg v. Schlieper, 48 Mo. 426-440..... 29

Brandanour v. Treat, 45 Ill. 372..... 30

Ruben v. Stephen, 25 Miss. 253..... 30

Berley v. Heath, 45 N. M. 524..... 30

Budderberger v. McDaniels, 38 Mo. 138..... 30

Tyron v. Robinson, 10 Rich. L. 160..... 30

Willet v. Scovill, 4 Abb. 405..... 30

Edwards v. Pope, 4 Ill. 465..... 30

Aldrich v. Reynolds, 1 Barb. ch. 613..... 30

Kennedy v. Hammond, 16 Mo. 341..... 30

Lane v. Hitchcock, 11 Johns 213..... 30

Hood v. Trimbal, 1 Lit. 413..... 31

Portsmouth et al. v. Byington, 12 O. S. 114... 31

Teaff v. Hewitt, 1 O. S. 511..... 31

Weber v. Wilcox, 45 Cal. 301..... 32

34 Cal. 270 and 80 Cal. 611 (22 Pac. 327)..... 32

Houghton Mifflin & Co. v. Cortelyou, 208 U. S. 154-157. 32-34

Woodson v. John, 3 Mun. 230..... 33

Jetter v. Langham, 5 Grat. 193..... 33

Houghton v. Meyer, 208 U. S. 149 33-34

In the Supreme Court
of the
United States

ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY,

Appellant,

v.

WILLIAM F. McKNIGHT, J. SAM ROWLAND and GEORGE W. BELLAMY, as Railroad Commissioners, State of Arkansas; JENNIE M. GALLUP, as the Executrix of Howard H. Gallup, Deceased, and WILLIAM J. METCALF,

Appellees.

No. 183

BRIEF ON BEHALF OF THE APPELLEES.

STATEMENT OF THE CASE.

This is an echo and grows out of the case of *Allen, et al., Railroad Commissioners of the State of Arkansas, v. the St. Louis, Iron Mountain & Southern Railway Company,* decided by the Supreme Court of the United States June

16, 1913, and known as the Arkansas Rate Cases, 230 U. S. 553.

After said cases were reversed by the Supreme Court of the United States, Judge Jacob Treiber, the Honorable Judge of the District Court for the Eastern District of Arkansas, made an order retaining jurisdiction of said cases, for the purpose of assessing damages sustained by shippers during the pendency of the injunction (see printed Record pp. 48 and 49, as printed in appellant's brief, pp. 2 and 3).

Afterward Howard H. Gallup commenced his action in the Baxter Chancery Court against the St. Louis, Iron Mountain & Southern Railway Company, to recover overcharges for excess freight and passenger fare collected from him from the time the Arkansas rates were suspended by the injunction granted in said cases, until they were restored after the reversal of said cases by the Supreme Court of the United States; that is, from September 3, 1908, to July 18, 1913. The Railway Company immediately made application to the United States District Court for an injunction restraining Howard H. Gallup from prosecuting said suit, then pending in the Baxter Chancery Court of Arkansas, on account of the claimed overcharges in freight and passenger rates, and also restraining William J. Metcalf and all other

persons and corporations from instituting similar suits, said application and supplementary complaint being found at printed Record pages 50 to 56.

William J. Metcalf was included as a defendant, appeared and filed his motion to dismiss; said motion is found at printed Record page 56.

And Howard H. Gallup appeared and filed his motion to dismiss the supplementary complaint and filed also his answer, the same being found on printed Record pages 57 to 59.

Jurisdiction of the court below was not asserted because of diversity of citizenship or because of other express statutory grounds of jurisdiction, but only because it was deemed that Federal District Court had jurisdiction because the proceeding for injunction was ancillary to the suit in that court wherein the original injunction was issued against the Railroad Commissioner of Arkansas, which injunction was reversed by this Court (230 U. S. 553), restraining certain railroad rates on intrastate traffic.

The case was heard by the District Court as upon motion for judgment on the pleadings, operating as a summary demurrer and decree was entered, making the temporary injunction permanent against Howard H. Gallup and William J.

Metcalf and the Board of Railway Commissioners in the State of Arkansas.

The defendants in said supplementary proceedings appealed from this decree to the Circuit Court of Appeals and the decree as entered by the district court was reversed and the action of the Court of Appeals reversing said decree has been appealed from by the St. Louis, Iron Mountain & Southern Railway Company, and the reversal of such decree is assigned for error.

In reversing the decree of the district court, the Court of Appeals by District Judge Amidon said:

"A hearing was had and the court rendered its decision as follows: 'A perpetual injunction is granted restraining these defendants and all other persons similarly situated from instituting or maintaining any suits for excess charges collected by the complainant during the pendency of this injunction.'

The defendants Metcalf and Gallup appealed from that order.

The order is too broad. The court had jurisdiction of all liabilities arising out of the bonds made pursuant to its orders. It could appoint a master before whom all claims based on those orders should be heard, and restrain actions in other jurisdictions to collect such claims. The bonds were judicial. The orders requiring them

to be given retained the jurisdiction of the court to ascertain and enforce liabilities arising from them. That power probably existed independently of such reservations.

Russell v. Farley, 105 U. S. 433;

In re Louisville, 231 U. S. 639;

In re Engelhard, 231 U. S. 646;

Louisville v. Cumberland Telephone Co., 231 U. S. 652.

This, however, was the measure of the court's jurisdiction. Parties from whom excessive rates had been exacted were not confined to suing on the bonds. They also had the right given them by law to recover the overcharges. That right was not destroyed by the injunction but was simply suspended. As soon as the injunction was out of the way, the right and remedy for its enforcement stood the same as if the injunction had never been issued.

Neither can the order be sustained on the ground of preventing multiplicity of suits. The rights of each shipper or passenger, in case he relies not on the bond but on the statute, arise out of an independent contract, and there is no community of right or interest, such as is necessary to support jurisdiction in equity for the purpose of preventing a multiplicity of suits.

Hale v. Allison, 188 U. S. 56, 72, *et seq.*;

United States v. Bitter Root Development Company, 200 U. S. 451.

The order of the trial court is modified so as to restrain only such actions as are brought on one or both of the bonds."

ARGUMENT.

I.

When the mandate of this court was received by the district court, reversing the case of Allen against the Railway Commissioners, and directing a dismissal of the case without prejudice, the court instead of entering said order of dismissal, retained jurisdiction for the purpose of assessing damages on the injunction bonds. This action on the part of the court seems to have been over the objection of the Railroad Company, and the record is silent as to whether the Railroad Commissioners of Arkansas objected, or merely acquiesced, but for the purposes of this case their action is of no consequence. The appellants on page 4 of their brief, quoting their supplemental complaint, allege that the action of the court was at the election of the defendants in the main case. The record of the court is that it was on "its own motion." The difference between consent and election or coercion is fully illustrated by the cases:

In re Moore, an Infant, 209 U. S. 490;
Ex parte Wisner, 203 U. S. 449.

Insert

Since the printing of this brief the Hon. Morris M. Cohn of the Little Rock Bar, who appeared, with others, as *amicus curiae* in the trial before the Honorable District Court at Little Rock, in a letter dated December 26, 1916, suggests:

> "Amongst other things we notice that Mr. Moore has undertaken to call in question the jurisdiction of the Court of Appeals in your case (see page 10 of his brief). He does not, however, seem to have saved this point in his assignment of errors. (See his brief, pages 8 and 9.)"

In the preparation of the brief by the appellees this question not having been raised in the Circuit Court of Appeals at St. Louis nor by the assignment of errors in this court, I deemed it to have been waived.

In re Moore, an infant, 209 U. S., 409.

The original case was properly appealed to the Supreme Court of the United States and there reversed. Jurisdiction of this supplementary proceeding is claimed by the Federal Court only because it had jurisdiction of the main case, and for no other reason, but because the principal case in which the primary controversy was litigated was properly appealed to the Supreme Court is no reason why all subsidiary questions arising in ancillary or supplementary proceedings would be appealable to this court. There were other questions involved than that of the jurisdiction of the Federal Court, which we desired to have passed upon by the Federal Court of Appeals, and we confidently submit that the case was properly appealed to the Federal Court of Appeals.

> See ~~section~~ 26, United States Statutes, 827; section 4, sec. 5 as amended, 29 U. S. Statutes, 492, and 20 U. S. Stat., section 6, 828.

The following authorities will throw light upon the proposition:

> "The jurisdiction of the court is not drawn in question by the denial of the right of the plaintiff to the judgment entered in his favor, nor in the authority of the court to enter the judgment put

in question, and therefore, an appeal can not be taken from the Circuit Court to the Supreme Court."

Woodbridge and Turner Eng. Co. *vs.* Ritter, 70 Federal, 679.

"When a final judgment or decision has been rendered in the District Court involving both questions of jurisdiction and other questions the party against whom it is rendered may elect to take his writ of error to the Supreme Court upon the question of jurisdiction alone, or to the Circuit Court of Appeals on the whole case. When he chooses the latter, the Circuit Court of Appeals has jurisdiction to determine the jurisdiction of the court below, as well as all other questions in the case."

Rust *vs.* United Water Works Co., 70 Federal, 129.
B. & O. Ry. Co. *vs.* Meyers, 62 Federal, 367.
Am. Sugar Ref. Co. *vs.* Johnson, 60 Federal, 503.
T. and P. R. R. Co. *vs.* Bloom, 60 Federal, 979.
King *vs.* McLean Asylum, 64 Federal, 225.
United States *vs.* Jahn, 155 U. S., 109.
Robinson *vs.* Caldwell, 165 U. S., 359.

"If an appeal is taken to the Circuit Court of Appeals and the whole case has been determined on its merits, an apppeal can not be taken direct from the Circuit Court on the question of jurisdiction."

Robinson *vs.* Caldwell, 165 U. S., 259.

Under the statute and these decisions we have concluded that the decision of the Circuit Court of Appeals in this case was final, and that the appeal by the appellants to this court is not allowable, and we now move to dismiss this appeal by the appellant because this court has no jurisdiction to hear and determine the same.

McHenry *vs.* Alfred, 168 U. S., 651.
The Bayonne, 159 U. S., 687.
Ansbrow *vs.* U. S., 159 U. S., 695.
Chappell *vs.* U. S., 160 U. S., 499.

We submit that this court is without jurisdiction to hear and determine this case.

II.

It is the theory of the impleaded defendants in the supplemental proceeding, that they were not parties to the original action for injunction by the Railroad Company against the Railroad Commissioners, and the only effect of the injunction granted in the original case was to tie the hands of the State *pendente lite* from enforcing its law, or rather the effect of the law was suspended by the injunction. Neither Gallup nor Metcalf, nor any other shipper had any interest in the bond and could not recover thereon in an action.

Hayes v. The Fidelity Co., 112 Fed. 872.

Upon the dissolution of the injunction, Gallup was free to bring his suit in any court he desired. It is a familiar rule that the court that first acquires jurisdiction retains it, and its jurisdiction cannot be interfered with by any other court, either state or federal. And, by express statute, the federal court is forbidden to stay or interfere with proceedings in the state court.

"The writ of injunction shall not be granted by any court of the United States to stay proceedings in a state court, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy."

Rev. Stats. Sec. 720.

Of course the application of this statute to this case depends on the question whether the jurisdiction of the district court, when it assumed jurisdiction over the original case, had before it every citizen in Arkansas, and particularly Gallup and Metcalf, and had jurisdiction over them for all purposes and as fully as though they had been named as defendants in the bill of complaint and had been served with summons. If they were such parties, then this statute, Sec. 720, is applicable; if they were not, then such statute is a complete defense to the action for injunction in this case, as granted by the district court at Little Rock.

So far as the record shows, Gallup was never in court in these rate cases until he commenced his action in the Baxter Chancery Court to recover his overcharges for freight and passenger fare. A plaintiff is in court when he files his complaint, but a defendant is not in court until he has been served with process, then by the *doctrine of relation* the action is pending from the *teste* of the writ as to all defendants actually served with that writ. If a defendant named in the writ is not served, hanging the writ, then the action is not pending as to that defendant. An alias writ may issue, but the doctrine of relation only operates from the *teste* of the writ

actually served on the named defendant, whether it be an original, an alias or a *pluribus*.

Gallup was not named in the original injunction suit, was never in court in that case, and was in no manner bound thereby. If the original case had been decided in favor of the Railroad Company by the Supreme Court of the United States, the defendants in the supplemental proceedings would have been bound thereby, not upon any doctrine of former *adjudication* or *res adjudicata,* (and they could have commenced or prosecuted an action, as Gallup did, without fear of contempt for violating the injunction order), but they would have been bound by that decision by reason of the ancient and venerable doctrine of *stare decisis,* which would have defeated his action in any court, either state or federal. Gallup was not a party to that action, was in no manner bound thereby, except, had the statute been declared unconstitutional by the Federal Court, a demurrer would have been sustained to his complaint in any court in which he may have filed it.

As the cases were decided against the Railroad Company, Gallup is not bound in any manner and can prosecute his suit in any forum he desires. This phase of the matter is fully discussed by District Judge Parker in

> *Kansas City Southern Railway Company v. Quigley,* 181 Fed. 190, and cases cited therein.

In this case Judge Parker holds that the reason persons who are not parties to an action are not bound is, that they are not parties, and that the action of a court cannot bind persons who are not parties to the action and have not been served with process.

Let me illustrate: Suppose the rates had actually been put in operation by the Railroad Commissioners of Arkansas, and the railway companies had refused to comply with either the statute or the order of the board fixing the rate, and Bellamy as an individual had brought suit against the Railroad Company for damages, and the statute had been declared unconstitutional and the order of the board confiscatory. Then Gallup had brought his action. Gallup certainly would not have been bound by the decision in the Bellamy case as a former adjudication; but the doctrine of *stare decisis* would have defeated his action. So had the decision of the Supreme Court of the United States been in favor of the railroad company, and the original case been affirmed, Gallup would not have been bound by such judgment as a former adjudication because he was not a party, but the action brought by him would have been defeated because the statute being unconstitutional or because the order was invalid and inoperative, as declared by the court in the first case, and would have been followed

by the court in the case brought by Gallup under the doctrine of *stare decisis,* and a recovery by Gallup would not have been allowed. Now Gallup not being a party to the action and the railroad being defeated, he is not bound in any manner and he is at liberty to pursue his remedy in any forum he desires or chooses.

Upon the reversal of the decree of the district in the original case by the Supreme Court of the United States and the state's hands were untied and the laws of the state were given operation and put in force. Then by the doctrine of relation they were in the same condition as though such laws had never been suspended and were in force as from the date of their suspension when they would have continued in force had their enforcement not been suspended by the injunction, and the defendant Gallup, in common with all other citizens of the state who were also shippers on the railroad, had a right to recover the illegal exactions or overcharges for freight and passenger fare on intrastate business *pendente lite* in actions brought for that purpose. Mr. Gallup, the respondent or impleaded defendant, commenced his action in the state court in the county of his residence, and in which he caused process to be served on the appellant, the St. Louis, Iron Mountain & Southern Railway Company.

It is our contention:

First—That the action by Mr. Gallup was properly brought in the Baxter Chancery Court and that the federal court was without jurisdiction to stay the prosecution of the action.

Second—The damages claimed for overcharges are not properly assessable as damages against the penalty of the bond.

Third—The persons named in the bond and they only, can have any claim for damages on or against the bond. That is the actual defendants in the action, the Railroad Commissioners of the State of Arkansas.

Fourth—Overcharges for freight and passenger fare are not damages within the purview of the bond, but arise by reason of the wrongful act of the railroad company in the collection of such overcharge.

Fifth—No damage can be allowed on or against the bond after the temporary injunction had been made permanent and pending the appeal, as such charges thereafter were permitted not by the operation of the bond but by and on account of the effect of the judgment.

Sixth—Howard H. Gallup cannot recover on the bond and his only remedy is his action to recoup by recovering the overcharge in the action in the same manner as though the overcharge had been made and no injunction had ever been granted.

A.

RULES.

The appellant on page 3 of its brief cites Rule 5 of the trial court as the reason for the court's order as well for retaining jurisdiction and appointing a master, as for the injunction order against the appellees. Courts cannot legislate, and the district court can no more extend its jurisdiction by its own rules than a man "taking thought can add one cubic to his stature." (Mathew VI, 27.)

"The making of rules," said Mr. Justice Valentine, "borders very closely to being an act of legislation and is to be tolerated rather than encouraged, and courts can only make rules in a few cases for the orderly transaction of business, and where they (the courts) are clothed with discretionary power. Citing Mr. Justice McLean in *Watkins v. Coleman*, 16 Pet. 60 and 61."

Coleman v. Newby, 7 Kansas 91, per Valentine.

III.

PERSON NOT A PARTY.

Mr. Gallup was not a party to the original action of the *Railroad Company v. The Arkansas Commissioners*, and when the statute fixing the passenger fare at 2 cents a mile was held valid and binding on the railroad company, as was also the freight rates fixed by the railroad com-

missioners, he commenced, as he had a right to do, his action against the railroad company for his overcharges. If he was not a party to the action, and the federal court had not prior jurisdiction, (and we contend that it had no such prior jurisdiction), then section 720 prohibits the federal court staying the action in the state court.

If Gallup was bound by the judgment or order of the federal court retaining jurisdiction for the assessment of damages, why was he not made a party to the suit, and the bond be the basis of the recovery?

If the injunction in the original suit had been sustained, then to a certain extent the Railroad Commissioners would have represented the interest of the shippers, and they would have been bound, not on the principle of *res adjudicata*, but on the doctrine of *stare decisis*.

But the bill being dismissed, the shippers could not be represented by the railroad commission, as their interest in each case is varied.

Again, neither the state nor the commissioners were damaged by the collection of the illegal rates, either freight or passenger, by the railroad company. It was only an individual damage, and can be recovered only by the individual sustaining the damage.

Phillips v. Amalgamated Association, 208 Fed. 335.

The first question that presents itself even on the theory that Gallup is a party and is bound by the doctrine of *res adjudicata* is, had the court power to retain the case and compel the shipper to appear in his court and make proof of his damage? This question first came before the Supreme Court of the United States in the case of *Bein v. Heath,* 12 Howard 168, when an attempt was made to have the United States Court follow the practice of a state court, the state in which the case arose from whose court the case was removed to the federal court, and the Supreme Court of the United States, says:

"The obligor in an injunction bond given in proceedings in the United States courts will not be subjected to state laws in fixing his liability upon the bond, and though the state practice permits the assessment of damages and the entering a decree thereon against the obligor immediately upon the dissolution of the injunction. Such practice will not be recognized in the United States courts."

Bein v. Heath, 12 Howard 168.

There is a case decided by the Supreme Court of the United States that on first blush seems to conflict with the doctrine enunciated in *Bein v. Heath,* and this is the case of *Russell v. Farley,* 105 United States 443, which seems to be relied upon by appellant, and which the Honorable Judge

Jacob Treiber had in mind and on which he based his decision in granting the injunction in the supplemental proceedings, in which Howard H. Gallup is impleaded. This case, however, when examined, shows there is no real conflict.

The case of Russell against Farley, the injunction was granted on the application of a receiver appointed by the United States Court. Now it is well understood that courts in the decision of cases deal only with the case and the facts and the law governing, that is before them, and a case is not an authority unless the facts are analogous.

In *Bein v. Heath* the action was by an individual in his individual capacity. In *Russell v. Farley* the action was by a receiver duly appointed and acting under the order of the court, and acting in his representative capacity at the direction of the court appointing.

It has always been the practice of courts of equity to allow their receivers to be sued only in their own court, and they have a discretion to deny permission to sue the receiver in any and all cases. So in that case the court well says:

> "The allowance of damages was so nearly discretionary that the case would not be reversed."

But it was not on account of any equity principle except the right of the court to protect its receiver that the case was retained and damages denied by the court on the bond on the dissolution of the injunction.

So that under *Bein v. Heath* 12 How. 168, the equity courts of the United States have no power to retain jurisdiction of the case and assess damages by reason of the wrongful granting of the temporary injunction as between the parties and the principles of this case have not even been modified by *Russell v. Farley,* and the extension by some of the United States district courts of the supposed doctrine of the case of *Russell v. Farley* is wholly unwarranted.

The power did not exist under the old English chancery practice, and the statement in *Russell v. Farley* as to the English chancery practice had reference to suits against receivers and not to the practice of retaining jurisdiction to assess damages against the bond.

In *Phelps v. Foster,* 18 Illinois 309, Mr. Justice Caton said:

"I have with considerable reluctance come to the conclusion that the court exceeded its power in awarding damages to the defendant and against the complainant, except in the case of an injunction to restrain a judgment at law (a purely statutory provision of the State of Illinois) I can find

no warrant in the statute for awarding damages upon the dismissal of an injunction bill, and *I cannot find authority for sustaining it in the practice of the English courts of chancery.* (The italics are ours).

The general principles of equity jurisdiction are against it. It is granting affirmative relief to the defendant without a cross bill and when the pleadings do not justify it."

Phelps v. Foster, 18 Illinois 309.

In some states this practice is allowable. In Alabama the legislature has given the Supreme Court power to make rules to govern the equity practice, and a rule has been made allowing this practice.

In Vermont and some other states the power has been expressly given by statutory enactment, but in all these states the courts hold that the power of the court of equity to retain the case and assess damages against the bond as a remedy is purely cumulative and not exclusive and is at the option of the defendant and not of the plaintiff in the injunction.

Surgis v. Knapp, 33 Vt. 486;
Edwards v. Pope, 3 Scam. 465;
Roberts v. Bent, 4 O. S. 502.

In the case at bar the railroad company seems to be praying that relief be granted to

the defendants and others not parties to the suit, and compel such parties to litigate the damages that might have accrued to them during the pendency of the temporary injunction, whether they want to or not, and to prevent by injunction any litigation to recover the unlawful overcharge while the permanent injunction was in force, and to prevent recovery at all in any court. In other words the railroad company, after having unlawfully exacted millions of dollars from the people of Arkansas now seeks to prevent being compelled to disgorge, by an injunction against the recovery of any part of the illegal exaction after the final decree making permanent the temporary injunction, and to all exactions during the pendency of the temporary injunction, compelling the litigation at a place (Little Rock, the capital of Arkansas) so distant from the homes of the majority of the shippers as to render litigation for the small amounts an impossibility and this not with any desire that justice may be done, but with the full intent to defeat it.

There is no receiver in this case to be protected, each citizen of Arkansas is sovereign and can choose his own forum and his own remedy for the violation of his rights. When Christ was here on earth he intimated to the Jews that they were slaves, and they retorted that they were the "children of Abraham and had never been in

bondage." The citizens of Arkansas do not need a railroad company that has filched by unlawful exactions millions of dollars from them in the last five years, to act as their guardian. They think they are capable of electing and pursuing their own remedy in the forum of their home county, where justice can be had as in the old English courts of justice, "for the asking." The railroad company is in the position of saying: "I've tagged you, but you can't tag me, I've my fingers crossed."

IIIA.

It may not be amiss at this place to call the attention of the court to the Missouri rate cases, reported in the Supreme Court Reporter in Vol. 33, pages 976 to 984. After the reversal of these cases the matters came before Judge Smith McPherson for entry of the mandate of the Supreme Court of the United States, and an attempt was made to get him to retain jurisdiction of the cases under an order similar to that made in this case by Judge Treiber (see printed record, p. 58). The opinion of the Honorable Judge sitting for the Western District of Missouri at Kansas City, on January 30, 1914, is printed in the Federal Reporter, Vol. 210 at page 902. In that case while the court retained jurisdiction of the case, he made it optional with any party

from whom illegal exactions had been collected during the pendency of the injunctions to make claim in his court or bring a separate suit, as they desired, and might elect. So we have today in our circuit two rules in two adjoining states. In Arkansas parties aggrieved are enjoined from resorting to the state courts for their redress and in Missouri they are permitted to exercise their option.

We insist that the rule laid down by Judge Smith McPherson is the correct course of procedure, the railroad companies consenting that the court may retain jurisdiction for that purpose. In Arkansas the Honorable Judge made the order of his own motion (Printed Record p. 58).

The fact that he invoked rule 15 does not make the matter any more valid and binding. If the equity courts of England had no such power, and this power has not been conferred by statutory provision, then the court could not confer such power on itself by the rule (the said rule is found in printed Record pp. 76 and 77). If such rule is "among the rules of the circuit and district courts of this circuit," then such rule would have been binding on Judge Smith McPherson as well as upon Judge Treiber, and as any such rule is disregarded by Judge McPherson it was error for Judge Treiber to follow it as a rule of procedure.

IIIB.

Nor will the fact that the Honorable, the District Judge, erroneously concluded that the difference between the rates fixed by the laws of Arkansas and those continued in force by the railroad company during the continuance of the injunction, would or could be included in the penalty of the bond given at the time of the granting of the temporary injunction and would be damages within the purview of the law making provision for the giving of such bond, alter the case, as the appellant Howard H. Gallup was not a party to that action and has no interest in the bond given therein. The bond could cover only the damages allowed by the usages of the chancery court of England or such as are provided by the acts of Congress, and we contend that the excess or overcharges is not within the penalty of the bond.

IIIC.

The right of Gallup to recover for the overcharges in his suit in the Baxter Chancery Court does not flow from the injunction, but is an action in the nature of *assumpsit*, as for money had and received, brought in the chancery court, because an accounting is necessary to fix the amount of recovery. The railroad company has collected more freight and passenger fare from the ship-

per than it was authorized to collect. And the difference between what it was authorized to collect and what it did collect is in its treasury, but belongs to the shipper from whom it was collected. The situation has all the essentials to support an action as for money had and received.

"*Assumpsit* will lie whenever the defendant has received money which is the property of the plaintiff, and which the defendant is obliged by natural justice in equity to refund.

The form of their indebtedness or the mode in which it was incurred is immaterial."

Bone et al., Trustee, v. United States, 93 U. S. 642.

In other cases cited in 2 Enc. U. S. Sup. Ct. Rpts. 641. Also:

Cory v. Curtis, 3 Howard 236;
Swift etc. Co. v. U. S., 111 U. S. 232;
Lonergan v. Buford, 148 U. S. 241;
Lanborn v. Board of County Commissioners, 97 U. S. 181.

In this case the St. Louis, Iron Mountain & Southern Railway Company is a corporation organized under the laws of Arkansas, and the district court had no jurisdiction of ordinary litigations between it and the citizens of the state of Arkansas.

However, the shippers had many rights other than those measured by the bonds in the injunction case, and they have the same rights without the bonds that they have with the bonds, that is, they have an action for money had and received.

New York v. Brown, 179 N. Y. 303, (72 N. E. 114);

Chicot Lumber Co. v. Dardell, 84 Arkansas 145.

IIID.

Judge Treiber in his opinion (on printed Record p. 69) says:

"Suppose the court when it granted the temporary injunction had required the railroad company to deposit in the registry of the court all the excess charges to be there impounded until the final determination of the cause, can there be any doubt of the power of the court in that case to have enjoined the shippers from maintaining independent suits in other courts for the recovery of such excess charges?"

There is a vast difference between having the money in the registry of the court and requiring the parties to interplead for the money, and having a bond in which they have no interest. And not a single case can be found anywhere to sustain such a contention. The two cases are not analogous.

IIIDa.

The cases *in re Englehard & Sons company*, 231 U. S. 646, and *in re City of Louisville*, 231 U. S. 639, deal with the situation supposed by Judge Treiber, and hold the claimants were parties to the suit to the extent that they could take advantage of the terms imposed on the issuing of the injunction. However, in that case the claimants would not have had a right of action for the money that had been collected from them, as it was collected by virtue of the injunction, and was not held by the telephone company, so that an action for money had and received would not lie. The terms imposed were that the funds should be paid into court, and later that they should be segregated and held apart by the telephone company, and paid into court when ordered. The situation was such that the telephone company held the fund as trustee or depository for the court, and its answer to an action of *assumpsit* would have been that it had no control of the fund, but that the control was in the court. Here the situation is materially different if the shippers have any remedy against the bond (which we do not concede), the railroad company does not hold a fund subject to the orders of the court, as these terms were not imposed, but the status of the railroad company is that it gave bond to pay to the claimants the amount due them, not

to exceed a specified amount. The railroad company is a debtor to the shippers under two separate obligations—one in a limited amount under the obligations of its bond, the other in the amount that it holds for any individual shipper under the rule that it should not hold the money which it does hold and has no claim to.

Suppose in this case, as in the Missouri rate case, that a bond for only $10,000 had been given, the overcharges amount to more than $1,000,000. Would the shippers then only be entitled to recover their overcharges from the bond? If the bondsmen had become insolvent, would the shippers still be required to look to the bonds for *recoupment?* It seems clear that after the decree legalizing the higher rates had been reversed and held to be erroneous, the shipper would have the right to recover the difference between those two rates in an action in the nature of *assumpsit* as for money had and received in any court having jurisdiction of the parties and the subject-matter of the litigation. The action of the shipper is an action for restitution for money coerced from him under the reversed decree and this money, it seems clear may be recovered in an independent action.

New York v. Brown, 179 N. Y. 303, 72 N. E. 114;

Chicot Lumber Company v. Dardell, 84 Ark. 145;

Dodson v. Butler, 101 Ark. 416.

The nature of the action by the shippers to recover the overcharge is concisely stated by Judge Van Valkenburg in the case of the *State of Missouri ex rel. Barker v. C. & A. R. R.,* 216 Fed. 562.

P. 564-(1): "The briefs have been read and attentively considered. I am clearly of the opinion that no federal question is involved. The suits are not brought on the bond, nor for any damage accruing from the injunction, as such. They merely seek to recover alleged overpayments of rates and charges made under practical duress and in violation of the terms of what has now been adjudged to be valid state regulations. Litigation of the same or similar questions, or of rights growing out of adjudications in federal courts, is not confined to federal jurisdictions. In this connection it has been suggested that 'pleading by plaintiff of the maximum rate statutes of Missouri,' raises a federal question, etc." * * * "but such is not the case."

The above states our position exactly. Gallup did not sue on the bond, nor for any damage accruing from the injunction as such, but did seek to recover the overpayment of rates and charges made under practical duress and in violation of the terms of what has now been adjudged to be a valid state regulation. If shippers have the right to sue in the state courts in Missouri to re-

cover the overcharges growing out of the rate cases in that state, why have we not the same right in Arkansas?

If this litigation involves no federal question in Missouri, how does it involve a federal question in Arkansas? If it is not within the federal jurisdiction in Missouri, how is it within the federal jurisdiction, and exclusively so, in Arkansas?

IV.

The liability upon the injunction bond is limited to such damage as arises from the suspension or invasion of the vested legal rights by the injunction. Speculative or remote damages are not allowable nor are those which are merely consequential. The limit being such damages as flow directly from the injunction as its immediate consequence.

Stewart v. State, 20 Md. 92;
Morgan v. Megley, 53 Pa. St. 153;
Brown v. Jones, 5 Nev. 374;
Collins v. St. Claire, 51 Ill. 328.

Only damages can be recovered that are such as arise from the operation of the injunction itself, and not such as are occasioned by the suit independent of the injunction itself.

Burgen v. Sharer, 14 Monroe 497.

In a case where the collection of a claim was enjoined and the temporary injunction was afterwards dissolved, it was held the amount of the claim could not be recovered on the bond even though the statute of limitation bar during the litigation.

Duncan v. Davis, 37 Ala. 95.

The injunction in the original case only stayed the state of Arkansas and prevented its executive officers from enforcing the laws of Arkansas as to freight and passenger rates during the pendency of the injunction, but the granting of the injunction did not vest any right in the St. Louis, Iron Mountain & Southern Railway Company to collect the illegal rate which it did collect, and such collection was an independent tort or crime (certainly an unlawful act, and the injunction being in force did not make it lawful), and was not the natural and proximate consequence of the injunction, except as the order prevented the state from enforcing its law.

Ashley v. Morrison, 1 Esp. 48;
Vickers v. Wellocks, 8 East 1;
Patterson v. Kingland, 8 Blatchford 278.

To the same effect is:

Lacy v. Taylor, 24 Md. 282;
Meysenberg v. Schlieper, 48 Mo. 426-440.

Also:

Brandanour v. Treat, 45 Ill. 372;
Ruben v. Stephen, 25 Miss. 253.

It has been held that where a suit or execution at law is stayed by injunction the claim or judgment cannot be recovered as against the bondsmen, nor can the interest, unless the plaintiff has in the meantime become insolvent.

Berley v. Heath, 45 N. M. 524;
Budderberger v. McDaniels, 38 Mo. 138;
Tyron v. Robinson, 10 Rich. L. 160;
Willet v. Scovill, 4 Abb. 405;
Edwards v. Pope, 4 Ill. 465;
Aldrich v. Reynolds, 1 Barb. ch. 613;
Kennedy v. Hammond, 16 Mo. 341.

In *Lane v. Hitchcock,* 11 Johns 213, the court says:

"Proof was offered at the trial (for recovery on the bond) that the mortgagor was insolvent and had no other property than the mortgaged premises out of which the debt could be satisfied. As this was not pleaded, to allow this proof without averment was to take the defendant (the bondsman) by surprise."

Where damages are decreed on the dissolution of an injunction the court cannot go beyond

the bond and award greater damages than the penalty fixed in the bond.

Sturgis v. Knapp, 33 Vt. 486.

Where the sale of property under a judgment is enjoined and afterwards the temporary injunction is dissolved, the surety on the injunction bond will not be subjected to the payment of the judgment if the collection of the judgment was not enjoined.

Hood v. Trimbal, 1 Lit. 413;
Portsmouth et al. v. Byington, 12 O. S. 114;
Teaff v. Hewitt, 1 O. S. 511.

The measure of damages on the bond is the real loss to the defendant, that which he actually incurred, with costs and not the amount of the execution.

V.

We now come to the question of the liability of the bondsmen for damages to the plaintiff after the temporary injunction had been made permanent. The answer of Gallup alleges (printed Record p. 58):

"Said temporary injunction having been made permanent on the 11th day of May, 1911, but vacated July 18, 1913, after the case had been reversed by the Supreme Court of the United States,

and was ordered to be dismissed without prejudice on June 16, 1913, and this respondent says that the greater part of the said overcharges sued for in his said action were unlawfully collected from him after the temporary injunction was made permanent and between said time, to-wit, May 11, 1911, and the dissolution thereof on July 18, 1913."

Sureties on a bond given on the granting of a temporary injunction are not liable for damages after the injunction has been made perpetual, although the decree has been reversed.

Weber v. Wilcox, 45 Cal. 301.

See also:

34 Cal. 270 and 80 Cal. 611 (22 Pac. 327).

This identical question was before the Supreme Court of the United States at the October, 1907, term, in the case of *Houthon Mifflin & Co. v. Cortelyou,* as postmaster general of the United States and reported in 208 U. S. 154-157, and it was there held that the bond was liable only during the hanging of the temporary injunction, that after the decree the damages were caused by the decree and not by the temporary injunction, hence the bond was not liable, as even though no temporary injunction had been granted, yet if the action had been prosecuted to a final judgment the injunction would have been operative with-

out the bond, hence the bond was liable only until the taking effect of the permanent decree, and this even though such decree were afterward reversed.

Woodson v. John, 3 Mun. 230;
Jetter v. Langham, 5 Grat. 193.

See also:

Houghton v. Meyer, 208 U. S. 149.

Counsel for the complainant admit in their complaint that we are correct in our contention that we could not, even were we parties to the original injunction suit, recover against the bond for damages accruing after the temporary injunction had been made final, but they do go a step further and say that we could not recover against them in a direct suit. They allege (printed Record p. 55):

"Complainant says that the final decree entered in the aforesaid cause on the 11th day of May, 1911, hereinbefore referred to, it was ordered that the bond for injunction filed by the complainant be released and the sureties thereon be discharged from further liability under said bond and preclude any recovery of damages on said bond or by reason of or growing out of the injunction ordered in the aforesaid cause. Complainant avers that upon the rendition of the final decree in said cause perpetuating and making the temporary injunction theretofore granted permanent, said bonds ceased by operation of law to have any effect, and complainant is

not liable for any damages that may accrue to any passenger or shipper after the rendition of the final decree making the temporary injunction permanent."

In other words, with the appellants it is a case of "heads I win, and tails you lose."

Let us illustrate: Suppose that Gallup, as alleged by him in his complaint, had paid $6,000 overcharges and that two-thirds of this, or $4,000, was paid during the interval between the decree of the circuit court making perpetual the preliminary injunction and its reversal by the Supreme Court. Under the holding of *Houghton, Mifflin & Co. v. Cortelyou,* 208 U. S. 154, see also *Houghton v. Meyer,* 208 U. S. 149, would the shipper be without a remedy? Would not the railroad company be in the attitude of having collected from him $4,000 under a decree reversed by the highest court of the land as erroneous and yet an action for restitution in a proper court denied him? Is the English maxim "that there is no wrong without a remedy" to be proved to not exist in America?

We agree with the allegation of counsel in that damages cannot be assessed against the penalty of the bond after the entry of the final decree, and we further contend that overcharges for freight and passenger fares cannot be assessed against the bond in any event by the shippers.

We agree that even though Howard H. Gallup had been a party to the original suit, that he could not have recovered any damage on the temporary injunction bond in the *interim* between the granting of the permanent injunction and the reversal of the final judgment by the Supreme Court of the United States. And we further contend that the overcharges for freight and passenger fare cannot in any event be recovered by shippers and passengers (of whom Gallup is one) as against the bond, for two reasons. He was not a party to that action in which the bond was given, and further such overcharges are not such damages as result from the natural consequence of the granting of the temporary injunction but are the result of the wrongful and unlawful act of the railroad company in collecting such overcharge. The granting of the injunction did not make the overcharge lawful, and when the injunction that suspended the operation of the laws of the State of Arkansas was vacated, the railroad company must make restitution.

New York v. Brown, 179, N. Y. 303.

Through no fault of the railroad commissioners representing the shippers, through no fault of the shippers themselves and only on account of an error of the court in the original proceeding, were these excess charges exacted—charges above

the legal rate, and to hold that such sum could not be recovered in an action for restitution, is a proposition to which we do not think that a court of equity will assent.

Under a somewhat similar situation the court in *Chicot Lumber Company v. Dardell,* 84 Ark. 145, said:

"The fact that there was an injunction, which may or may not have aided the lumber company in making this conversion, will not prevent Darddell having redress therefor exclusive of a possible remedy upon the injunction bond."

VI.

A MULTIPLICITY OF SUITS.

The railroad has sought to invoke the equity powers of the court and secure a sweeping injunction of a blanket nature (and as odious if it can be sustained, as the old general warrants), forbidding anyone, whether a party to the proceedings or not, from suing to recover their overcharges. On the ground that "unless this court gives relief the complainant will be sued in 'a multitude of suits.' And it would be unjust and inequitable to allow such a multiplicity of suits as would result from independent actions prosecuted against complainant."

Stating in one paragraph that the court cannot give relief on the bond after the final injunction

decree that was reversed, and in another that we ought not to be allowed to sue at all to recover the money unlawfully exacted from us.

This is the first time in the history of the law that a party that has violated the statutes of a state and the rights of its citizens a multitudinous number of times has had the "gall" to ask the interposition of a court of equity to prevent paying the penalty on the equitable doctrine of restraining "a multiplicity of suits." Now, in order to invoke the exercise of this doctrine by a court of chancery it is necessary that the suits must be between the same parties and about the same subject-matter. It is not a multiplicity of suits that the railroad companies fear, it is a multitudinous number of suits commenced and prosecuted by those from whom they have unlawfully exacted exorbitant and excessive railroad rates, both freight and passenger. But as the law guarantees to every person a speedy remedy according to the law of the land (the *lex terra*) a court of equity is powerless to aid them in this instance.

Returning to my illustration: Suppose the rates had been actually put in operation by the railroad commissioners of Arkansas and the railroad company (the appellant here in this case) had refused to comply with the statute or the order of the board fixing the rates and Bellamy as an individual had brought suit for damages against

the railroad company and all the other people of Arkansas had waited to see the outcome of the litigation and the statute and order had been sustained and declared valid (as was done in the injunction suit) and after the final judgment in that case everyone whom the railroad company overcharged brought suit, would the railroad company have been heard to come into a court of equity and enjoin the plaintiffs on account of the great multitude of suits being launched against it and be permitted, with its hands reeking and slime and its purse full of "tainted money" exacted in defiance of the laws of Arkansas, to plead its own wrong in a court of equity and ask for an injunction against such actions? If it could not do so in the presumed case and under those circumstances, can it now? The mere fact that it was protected from criminal prosecution by the injunction while it was making the exactions does not in any manner absolve it from making restitution after the litigation is over.

When the workmen went to Gallileo and told him that their pump would not work, he told them that "Nature did not abhor a vacuum beyond 32 ft." While both the law and equity abhor a multiplicity of suits, to invoke the arm of the chancery court it is necessary that the *multiplicity of suits* between the same parties and about the same subject-matter. Neither the law nor the conscience of

the chancellor is shocked when a multitudinous number of actions is prosecuted against a defendant, either civilly by individuals or by the state to redress an infinite number of crimes and the fact that unless the railroad company disgorges and pays back the money it has filched from the citizens, shippers and passengers of Arkansas, it will be sued an infinite number of times, is no more reason for an injunction in its behalf than it would be reason for a wholesale murderer or a bootlegger to ask an injunction to restrain a prosecution by the state against him.

We believe that the court of appeals in its opinion, record page 79, correctly declared the law as to a multiplicity of suits.

"Neither can the order be sustained on the ground of preventing multiplicity of suits. The rights of each shipper or passenger, in case he relies not on the bond but on the statute, arise out of an independent contract, and there is no community of right or interest such as is necessary to support jurisdiction in equity for the purpose of preventing a multiplicity of suits."

Hale v. Allison, 188 U. S. 56, 72 *et seq.;*
United States v. Bitter Root Development Company, 200 U. S. 451.

The railway company when it violates the laws of the state and outrages the rights of others is no better than any other malefactor; let it act

justly and it will not be sued an unjust number of times.

We submit that the judgment of the circuit court of appeals should be affirmed.

Respectfully submitted,

ALLYN SMITH,
For Appellees.

IN THE

Supreme Court of the United States

ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY..... *Appellant*,

v. No. 183.

WILLIAM F. McKNIGHT, *ET AL*.. *Appellees*.

RESPONSE TO MOTION TO DISMISS FOR WANT OF JURISDICTION.

Referring to the addendum to appellee's brief filed with the motion to dismiss, we submit that the Amicus Curiae who advised the learned counsel that the point as to the jurisdiction of the court of appeals was waived because it was not set out in the assignment of errors, was himself badly advised, inasmuch as the facts upon which the objection is founded appear in the record.

On every writ of error or appeal, the first and fundamental question is that of jurisdiction, first, of this court, and then of the court from which the record comes. This question the court is bound to ask and answer for itself, even when not other-

wise suggested, and without respect to the relation of the parties to it."

U. C. & L. M. Ry. v. Swan, 111 U. S. 379, 382.

C., B. & Q. Ry. Co. v. Willord, 220 U. S. 413, 420.

Cases Cited in the Addendum to Appellee's Brief.

In re Moore, an Infant, 209 U. S. 490, was a suit brought by a citizen of Illinois against a citizen of Kentucky in the State of Missouri. The suit was removed by the defendant to the U. S. Circuit Court; after the removal plaintiff filed an amended complaint, and afterwards presented a petition for mandamus in this court to compel the remand of the case to the State court. The court held that as the plaintiff and defendant were citizens of different States, and within the federal jurisdiction, either party could waive the objection that the removal was not to the right district, and that both parties had accepted the jurisdiction of the circuit court, the defendant by filing the petition for removal and the plaintiff by filing an amended complaint and joining in a stipulation for continuance, after the case had been removed.

Robinson v. Caldwell, 165 U. S. 359. This case was brought in the State court and removed to the circuit court of the United States. On appeal the jurisdiction of the Circuit Court was questioned

by appellant on the ground that plaintiff could not have brought the original suit in that court, and therefore the case was not removable. The appellant prosecuted appeals to the Circuit Court of Appeals and to this court. This court held:

> "As no question of jurisdiction was certified by the Circuit Court, and as the defendant chose not to await the action of this court upon the appeal to it from the Circuit Court, but invoked the jurisdiction of the Circuit Court of Appeals upon the whole case, he must be held to have waived his right to any decision here upon his direct appeal from the Circuit Court."

McHenry v. Alford, 168 U. S. 651. In this case the Circuit Court of Appeals certified to this court six questions for instructions for the proper decision of the cause. The court held that the Court of Appeals had not complied with the rule requiring that each question present a distinct point or proposition of law clearly stated so that it can be distinctly answered without regard to the other issues of law in the case, and declined to answer the first, third and sixth questions for that reason, the first question involving the jurisdiction of the Circuit Court. The court used this language at page 659:

> "If the whole case were here upon writ of error or appeal, we should have to look into any question of jurisdiction, whether raised or not, but we are not obliged to

do so when questions only are certified to us, unless presented in proper form."

The Bayonne, 159 U. S. 687.

Ansbro v. U. S., Ibid. 695.

The first of these cases was an appeal from the District Court of the United States, the second one a writ of error from this court to the Circuit Court of the United States. In both cases the jurisdiction of the lower court was questioned, and this court declined to take jurisdiction on the ground that the question had not been properly certified under the provisions of the statute.

Chappell v. U. S., 160 U. S. 499.

This case was brought to the Supreme Court on writ of error to a District Court of the United States, without formally certifying, or otherwise specifying, a definite question of jurisdiction. The court held that the question of jurisdiction was not sufficiently certified under the provisions of that clause of the statute providing that appeals may be taken direct to the Supreme Court in a case involving the jurisdiction of the court from which the appeal is taken, but it further held that under the other clause of the statute, providing for appeals in cases in which the constitutionality of the laws of the United States is drawn into question, the court had appellate jurisdiction, and having acquired jurisdiction under that clause, it had power to dispose

not merely of the constitutional question, but of the entire case, including all questions whether of jurisdiction or merit (p. 509).

None of the cases cited have any bearing on this case, which is standing on appeal from the judgment of the Circuit Court of Appeals, under the provisions of Section 241 of the Judicial Code, granting the right of appeal in any case in which the judgment or decree of the Circuit Court of Appeals is not made final. Section 128 of the Judicial Code enumerates the cases in which the judgments and decrees of the Circuit Court of Appeals shall be final as follows: In all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy being aliens and citizens of the United States, or citizens of different states, and cases arising under patent laws, copyright laws, revenue laws and criminal laws, and in admiralty cases.

JURISDICTION OF THE CIRCUIT COURT OF APPEALS.

Neither in the main case to which this proceeding is supplemental and ancillary, nor in this proceeding, did diversity of citizenship exist; jurisdiction in the main case rested solely on the ground that the cause of action arose under the constitution of the United States.

Where that is the case the appeal lays directly to this court under the provisions of Section 238 of the Judicial Code.

In Union & Planters' Bank v. Memphis, 189 U. S. 71, 73, cited in our original brief, it was held that where an appeal was prosecuted to the Circuit Court of Appeals in a case that arose under the constitution of the United States, and had there gone to a decree from which an appeal was allowed to this court, the decree of the Circuit Court of Appeals should be reversed, not on the merits, but by reason of want of jurisdiction in that court. The court say: "If it were not so, the right to two appeals would exist in every similar case, notwithstanding, as we have repeatedly held, that such was not the intention of the act."

In Carolina Glass Co. v. South Carolina, 240 U. S. 305, 318, the court cited and approved the ruling in the case in 189 U. S., saying: "There is no allegation of diverse citizenship, and the trial court's jurisdiction was invoked solely upon the ground that the controversy involved the application of the Federal Constitution. In such circumstances the Circuit Court of Appeals is without jurisdiction to review."

A supplemental and ancillary bill is a continuation of, and, as to the *source* of Federal jurisdiction,

is referable to the jurisdiction of the court in the main case.

In Carey v. Houston and Texas Railway Co., 161 U. S. 129, it was held that as the jurisdiction of the Circuit Court was invoked in the original proceeding on the ground of diverse citizenship, an ancillary bill before the court must be treated as a continuation of the original proceeding and governed by the same rule as to the right of appeal, and the court, therefore, held in that case that inasmuch as the decree of the Circuit Court of Appeals was made final by the statute no appeal would lie in the ancillary proceeding.

The court at page 129 say:

> "Decrees upon controversies separable from the main suit may indeed be separately reviewed, but the jurisdiction of the Circuit Court over such controversies is not, therefore, to be ascribed to grounds independent of jurisdiction in the main suit."

In Rouse v. Hornsby, 161 U. S. 588, 591, the court say:

> "The jurisdiction of the Circuit Court over the petition was clearly referable to its jurisdiction of the equity suit, which depended wholly upon diverse citizenship, and the case comes directly within recent decisions of this court holding that under such circumstances the decrees and judgments of the Circuit Courts of Appeals are made final by section 6 of the Judiciary Act of March 3, 1891."

In Pope v. Louisville, New Albany Ry., 173 U. S. 573, 77, the court say:

> "And we have repeatedly held that jurisdiction of these subordinate actions or suits is to be attributed to the jurisdiction on which the main suit rested; and hence that where jurisdiction of the main suit is predicated on diversity of citizenship and the decree therein is, therefore, made final in the Circuit Court of Appeals, the judgments and decrees in the ancillary litigation are also final."

In Gableman v. Peoria Ry. Co., 179 U. S. 337, 342, the court say:

> "We have repeatedly held that the jurisdiction of such proceedings is dependent upon that of the main case."

Respectfully,

J. M. MOORE,
Attorney.

EDW. J. WHITE,
Of Counsel.